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No. 04-789

Supreme Court, U.S
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. WILLIAM JEFFREY GILLIAM

Petitioners,

v.

GENERAL DYNAMICS CORPORATION

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY BRIEF OF PETITIONER

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REASONS FOR GRANTING THE WRIT

General Dynamics Corporation ("GD") filed a Brief in Opposition claiming that the record below did not reach the issue of GD's assertion of a *Noerr-Pennington* First Amendment privilege for Congressional testimony. The record and decisions below show that GD's former President, James Turner, made false statements to the Senate. This Court should grant certiorari in order to address GD's continued assertion of a First Amendment right to provide "opinion" testimony to Congress.

GD claims that the court of appeals decision below and in *Newport News v. U.S.* are consistent. The Fourth Circuit's decision in its two *Seawolf* related cases establishes a standard which would support any executive agency procurement decision as being "rational."

GD claims that the issue of false certification liability under the False Claims Act was not raised below. The record and decisions below show that the issue of GD's violations of SEC rules and regulations was raised in the complaint and in the relator's motion for summary judgment.

The record and decisions below show a lack of uniformity within the circuits as well as presenting important questions of federal law. This Court should grant certiorari in order to address this lack of uniformity and in order to interpret these important federal statutes.

Contrary to GD's Brief in Opposition, a grant of certiorari will not vindicate individual rights. Certiorari will review expenditures of significant taxpayer funds and uphold the statutory scheme of ensuring the proper expenditure of taxpayer funds.

ARGUMENT

I. CONTRARY TO GD'S ASSERTIONS, BOTH THE DISTRICT COURT AND THE COURT OF APPEALS DECISIONS SUPPORT A *NOERR-PENNINGTON* FIRST AMENDMENT PRIVILEGE/EXCEPTION TO THE FALSE CLAIMS ACT

A. Under The Standards Applicable To Summary Judgment As Applied To The Decision Below, Turner Made Knowingly False Statements To The Senate

GD's Opposition Brief mischaracterizes and misrepresents Turner's Senate testimony, as well as the record below.

On page 13, GD carefully states that Turner's statements about closing Electric Boat did not apply to the *Seawolf* award. This claim is inconsistent with the transcript of Turner's Senate testimony, which is in the record below. Senator Joseph Lieberman asked Turner if it was true that Electric Boat would close unless the Senate approved awarding GD a no-bid contract for the third *Seawolf*. Turner responded affirmatively.

At page 11, GD claims that Turner was not asked questions about commercial opportunities. The transcript shows that Turner volunteered statements about GD's commercial opportunities, claiming that exploration of commercial opportunities began in "mid-1993." Turner testified "a thorough assessment of market opportunities was conducted covering submarine design and construction, overhaul and repair, and commercial business." The record below contains undisputed facts showing that GD began its assessment of market opportunities in 1991. Gilliam

testified that Turner claimed that he was ordered to abandon commercial businesses in "mid-1993;" not to thoroughly assess these opportunities. GD's Brief in Opposition disagrees with Turner's Senate testimony.

On page 3 GD claims that the Navy began its re-evaluations of submarine manufacturing plans in 1991 and on page 7 GD claims "at the same time that the Navy was re-formulating its submarine plans...Electric Boat was exploring...its commercial opportunities."

GD correctly states that the decision below found that GD's responses to the Navy in the BUR questionnaire were not false statements. In light of the appeals court's affirmation of summary judgment, Turner's Senate testimony must be viewed as false and Turner's statements to Gilliam must be viewed as true.

Turner characterized his testimony as "my perspectives on the requirements for continued production of nuclear attack submarines." Turner informed Gilliam that commercial work was essential to GD's survival as a nuclear submarine manufacturer.

GD made the same statements to the States of Rhode Island and Connecticut prior to 1993. In affirming summary judgment, the record below construes Turner's "perspectives" as untruthful.

GD continues to argue to this Court that Turner's testimony was entitled *Noerr-Pennington* First Amendment protection because Turner's Senate testimony must be construed as false.

B. There Is No *Noerr-Pennington* Immunity Under The False Claims Act

GD's Brief does not address the fact that the making of false statements to Congress violates 18 U.S.C. §§ 1001 and 1003. GD fails to address this Court's holdings in *Hubbard v. United States*, 514 U.S. 695 (1995)

holding that there is no "judicial function" exception to § 1001. GD likewise fails to address this Court's decision in *Watkins v. United States*, 354 U.S. 178 (1957) holding that the Congress has broad investigative powers to investigate fraud and waste.

C. The Decision Below Merits Review By This Court

GD's Brief in Opposition clearly shows their belief in a *Noerr-Pennington* First Amendment right to offer "opinion" testimony to Congress. The decision below is consistent with this belief.

Immunity to offer "opinion" testimony as suggested by GD would eviscerate both 18 U.S.C. §§ 1001 and 1003 as well as 31 U.S.C. §§ 3729 and 3730.

This decision represents an important question of federal laws that should be decided by this Court.

This Court should grant certiorari in order to review GD's claimed right to immunity in Congressional testimony.

II. CONTRARY TO GD'S ASSERTIONS, THE COURT OF APPEALS DECISION BELOW AND IN *NEWPORT NEWS* CONSTITUTES A REFUSAL TO APPLY JUDICIAL SCRUTINY TO ANY EXECUTIVE OR LEGISLATIVE PROCUREMENT DECISION

A. Under The Standards Applicable To Summary Judgment As Applied To The Decision Below, All Executive Procurement Decisions Are Immune From Judicial Scrutiny

GD's Brief in Opposition claims that there is no conflict between the decision below and the Fourth

Circuit's decision in *Newport News v. General Dynamics Corporation*, 960 F.2d 386 (4th Cir. 1992).

GD correctly observes that Judge Niemeyer participated in both decisions; in fact Judge Niemeyer stated (during oral argument) that the district court's decision below was consistent with the Fourth Circuit's decision in *Newport News*.

In *Newport News* the Fourth Circuit stated its agreement with the standard for review of federal procurement decisions established by the First Circuit in *Ulstein Maritime Limited v. United States*, 833 F.2d 1032 (1st Cir. 1987). The Fourth Circuit stated that a disappointed bidder faced a "heavy burden" in challenging procurement decisions.

In *Newport News* the Fourth Circuit overturned a district court decision mandating the award of the second *Seawolf* to Newport News in order to maintain two nuclear capable submarine shipbuilders. In their Brief in Opposition GD agrees that at the time of the Fourth Circuits *Newport News* decision the Navy chose to save $73 million rather than maintaining two shipyards. This 1991 decision was made at a time when the Navy was still planning on building one new submarine per year. The decision to save $73 million and not maintain two shipyards in *Newport News* was upheld as being "reluctant and rational."

Less than two years later, in 1993, the Navy's forecast of future submarine manufacturing requirements from 1993 thru 1998 was reduced from six to one. In 1993, in order to maintain two shipyards, the Navy proposed to spend in excess of $1.5 billion.

GD does not present any argument or describe evidence to refute the fact that in *Newport News* both GD and the Navy argued that the United States didn't need two submarine shipyards. The Navy avoided spending $73 million in 1991. Then, in 1995 GD and the

Navy sought to justify their mutual 1993 decision to spend over $1.5 billion to maintain two submarine shipyards to build fewer submarines.

B. The Decision Below And In *Newport News* Is Inconsistent With A "Rational Decision" Test

GD's Brief in Opposition mischaracterizes Gilliam's argument in favor of granting certiorari on the issue of the intra and inter-circuit conflicts presented by the decision below.

There is a split of authority in the circuits on the issue of whether district court have concurrent jurisdiction over pre-award contract claims. Both the First and Third Circuits have held that district courts have equity jurisdiction over pre-award contract claims. See *Ulstein Maritime v. United States*, 833 F.2d 1952 (1st Cir. 1987), *Coco Brothers v. Pierce*, 741 F.2d 675 (3rd Cir. 1984).

The Fourth and Ninth Circuits and district and bankruptcy courts in the Fifth, Tenth and Eleventh Circuits have held that district courts have no jurisdiction over pre-award contract disputes. The circuits having the more narrow view of contract review by district courts have nonetheless set aside government contracts. See *Mark Dunning Ind. v. Perry*, 890 F.Supp. 1504 (D. M.D. Ala. 1995).

The Fourth Circuit's decision in *Newport News* attempts to define the standard for setting aside government contracts as being limited to "rational review." However, the Fourth Circuits explanatory language also states that district courts reviewing procurement decisions must be "sedulous" in even considering any such review. Sedulous means persevering and constant.

By expressly stating that its decisions below and in *Newport News* were consistent, the Fourth Circuit has established a "sedulous" standard for review of procurement law and decisions. This standard will find all executive agency decisions to be "reluctant and rational."

C. The Decision Below Merits Review By This Court

The Navy officer who refused to spend $73 million to maintain two submarine shipyards, Admiral Millard Firebaugh, was subsequently hired by GD. Admiral Firebaugh provided testimony below in support of the Navy's decision to spend $1.5 billion to accomplish the same objective that was not worth $73 million to Admiral Firebaugh when he wore the uniform of the United States Navy.

This Court should grant certiorari in order to resolve the inter-circuit conflict concerning the jurisdiction of federal courts to review pre and post award contract disputes and the standards that federal courts should apply to these reviews.

III CONTRARY TO GD'S ASSERTIONS, THE DISTRICT COURT AND THE COURT OF APPEALS DECISIONS BELOW CONSTITUTE A REFUSAL TO RECOGNIZE FALSE CERTIFICATION LIABILITY UNDER THE FALSE CLAIMS ACTS

A. Under The Standards Applicable To Summary Judgment As Applied To The Decision Below, GD's 1992 Report On Form 10-K Violated SEC Disclosure Rules

GD incorrectly describes the record below regarding its 1992 SEC reports and the issue of GD's keeping "two

sets of books." GD's Brief in Opposition at page 21, states "false certification liability theory rests on factual as well as legal assertions that the courts below did not consider or weigh." This statement is incorrect.

Page 2 of Gilliam's Material Disclosure Statement provides "in addition to violating the False Claims Act...I believe that GD also violated both the SEC Laws and the Truth in Negotiating Act."

Page 4 of Gilliam's Statement of Undisputed Facts (in support of summary judgment) lists as undisputed fact 10 "GD in 1992 made statements to its shareholders and the SEC indicating that "commercial business" when added to government business was sufficient to "bridge the gap" in nuclear submarine production." On page 6, fact 20 states "the annual report (1992) said nothing about the ability to stay open being conditioned on any form of subsidy."

The decisions below affirm the truth of GD's 1992 statements and disclosures to the Navy concerning its lack of sufficient business to maintain the viability of Electric Boat without being awarded a no-bid contract for a third *Seawolf* submarine, a no-bid design contract for the first *Virginia* class submarine, and a no-bid order for the first several *Virginia* class submarines.

GD's 1992 disclosures to shareholders and the SEC were materially inconsistent with its 1992 disclosures to the Navy. Since GD's disclosures to the Navy are deemed true, its disclosures to shareholders and the SEC are false.

In both the record below and in the related bankruptcy court adversary proceedings GD has argued that while it may have committed securities fraud, it did not violate the False Claims Act.

In the summer of 1999, GD announced its intention to merge with Gulfstream Aerospace. According to the terms of the merger agreement, GD was to issue new

GD shares for all of Gulfstream's outstanding stock. Gilliam's counsel, the DOJ and the bankruptcy court discussed the issue of GD's intention to issue GD stock to Gulfstream shareholders. The bankruptcy court directed Gilliam's counsel to disclose the existence of the then-under-seal False Claims Act complaint to the SEC for review.

At the direction of the bankruptcy court, the SEC was informed of the existence of the complaint and the allegation that GD's 1992 Report on Form 10-K was inconsistent with GD's statements to the United States Navy. GD's characterization of the false certification issue as being "new" is simply untrue.

B. GD's Failure to Comply With SEC Rules Constituted A Material Breach Of Its Contracts With The Navy Leading To False Certification Liability

There is a split in the circuits regarding actual versus implied false certification liability under the False Claims Act. Both the Fourth and Fifth Circuits have stated that they might not recognize implied certification liability. A Fourth Circuit district court has stated "we need not address the validity and problems of an implied certification claim." *United States ex rel. Joslin v. Comm. Home Health*, 984 F.Supp. 374, 384-385 (D. Md. 1997).

In contrast the Fifth and DC Circuits recognize false certification liability under the FCA. *U.S. v. Southland Management*, 288 F.3d 665, 679 (5th Cir. 2002), *U.S. ex rel. Thompson v. Columbia Healthcare*, 125 F.3d 899 (5th Cir. 1997), *Ab-Tech Const. v. United States*, 31 Fed.Cl. 429 (Fed.Cl. 1994).

GD admits, in its appellees' brief below, that the Navy had the contractual right to monitor GD's compliance with SEC rules and regulations. GD's 1992

Report on Form 10-K failed to disclose the dire financial conditions that the record below deems to be true and correct.

The discrepancy between GD's actual financial condition and its statements to shareholders is clearly a violation of the SEC's disclosure rules. This violation of SEC rules and regulations would constitute a violation of the False Claims Act as a false certification.

C. The Decision Below Merits Review By This Court

The United States recently filed an *amicus curiae* brief with the Ninth Circuit expressing strong support for a broad interpretation of false certification liability under the FCA (*U.S. ex rel. Hendow & Albertson v. Univ. of Phoenix*, appeal no. 04-16247, dated January 7, 2005).

Review is warranted due to the strong support of the United States for broad false certification liability.

Granting certiorari is warranted in order to resolve the inter-circuit disagreement over false certification liability under the False Claims Act.

CONCLUSION

For all of the reasons set forth above, petitioner respectfully requests that this Court grant Certiorari.

Respectfully submitted
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